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Supreme Court, U.S.
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No. 03-1690

IN THE

Supreme Court of the United States

UNITED STATES OF AMERICA, *ex rel.*
JOHN C. KARVELAS,

Petitioner,

v.

MELROSE-WAKEFIELD HOSPITAL, MELROSE-WAKEFIELD HEALTHCARE CORPORATION, and HALLMARK HEALTH SYSTEM, INC.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF IN OPPOSITION

MICHAEL K. FEE
Counsel of Record
EMILY C. SHANAHAN
ROPES & GRAY LLP
One International Place
Boston, MA 02110
(617) 951-7000

Counsel for Respondents

189349

CP

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTION PRESENTED

Whether, as every Court of Appeals that has addressed this question has held, the heightened pleading requirements for fraud found in Fed. R. Civ. P. 9(b) apply to claims under the False Claims Act, 31 U.S.C. §§ 3729(a)(1), 3729(a)(2), which, at its core, is an anti-fraud statute.

SUPREME COURT RULE 29.6
DISCLOSURE STATEMENT

Melrose-Wakefield Hospital is a d/b/a of Hallmark Health System, Inc. Melrose-Wakefield Healthcare Corporation was dissolved on November 22, 2000. Hallmark Health Corporation is the parent corporation of Hallmark Health System, Inc., a non-profit corporation. As a non-profit corporation, no publicly held company owns ten percent (10%) or more of Hallmark Health System, Inc.

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STATEMENT

In his Petition for a Writ of Certiorari ("Petition"), Petitioner John C. Karvelas ("Karvelas") asks the Court to adopt a novel interpretation of the False Claims Act, 31 U.S.C. §§ 3729-3733 ("FCA"), and Fed. R. Civ. P. 9(b). Notwithstanding Karvelas' efforts to convince this Court otherwise, it is well-established that the FCA, at its core, is an anti-fraud statute. It is equally well-established that Rule 9(b)'s heightened pleading standard applies to all averments of fraud. Accordingly, the First Circuit did not break new ground by holding that Rule 9(b) applies to claims under the FCA. Rather, the First Circuit merely added its voice to the chorus of Courts of Appeals holding similarly. In holding that Rule 9(b) applies to FCA claims, none of these courts either erred in its interpretation of the FCA or ran afoul of the legislative intent of the FCA or the Court's prior decisions. As a result, no reason exists for this Court to devote its attention or resources to addressing the sole issue raised by the Petition, namely, whether Rule 9(b) applies to claims under the FCA.

Although Karvelas recites in his Petition the allegations in his *qui tam* complaint, he omits any mention of portions of the procedural history in this dispute, most significantly, that the instant case is not his first attempt to invoke the provisions of the FCA as support for a federal civil action against Melrose-Wakefield Hospital, Melrose-Wakefield Healthcare Corporation, and Hallmark Health System, Inc. (together, the "Hospital"). In May 2000, Karvelas filed his first complaint against the Hospital, as well as certain individual defendants not named in the present action, asserting a claim under the FCA's retaliation provisions, 31 U.S.C. § 3730(h), along with state law claims. Appendix

to Petition at 35a n.2, 53a ("Pet. App."). The district court dismissed Karvelas' first action on December 19, 2000. *Id.* Following the dismissal of his original complaint, Karvelas neither sought to amend his complaint nor appealed the dismissal. Instead, less than four months later, on April 6, 2001, Karvelas filed under seal the present *qui tam* action against the Hospital. *Id.* at 54a. On May 3, 2002, the government gave notice that it did not intend to intervene in this case. *Id.* Shortly thereafter, Karvelas' *qui tam* complaint was unsealed and the Hospital first learned of Karvelas' renewed FCA claims. *Id.*

REASONS FOR DENYING THE PETITION

The Court should deny the Petition for several reasons including: (1) the Courts of Appeals that have addressed the issue have uniformly and consistently held that Rule 9(b) applies to claims under the FCA; as a result, there is no conflict among the circuits that needs to be resolved by the Court; (2) the First Circuit's holding that Rule 9(b)'s heightened pleading requirements apply to claims under the FCA is entirely consistent with the legislative purpose and intent of the FCA, the 1986 amendments thereto, and the Court's prior decisions; and (3) the First Circuit's decision was correct on the merits.

I. THE PETITION SHOULD BE DENIED BECAUSE NO CONFLICT AMONG THE COURTS OF APPEALS EXISTS WITH REGARD TO WHETHER RULE 9(b) APPLIES IN THE FCA CONTEXT.

Neither before this Court nor before the First Circuit has Karvelas identified a single decision by *any* court adopting – or even considering – the novel proposition that he asks this Court to embrace, namely, that Rule 9(b) does not apply to FCA claims. Indeed, Karvelas does not take exception with the First Circuit's assembled authority, namely decisions by at least eight other Courts of Appeals holding that Rule 9(b) applies to claims under the FCA.[1] *See* Pet. App. at 11a (citing *Yuhasz v. Brush Wellman, Inc.*, 341 F.3d 559, 562-63 (6th Cir. 2003); *United States ex rel. Clausen v. Lab. Corp. of*

1. The Seventh and Eighth Circuits should be added to this list to bring the total number of circuits applying Rule 9(b) to claims under the FCA to 11, at a minimum. Although it did not expressly consider the issue of whether Rule 9(b) applies to claims under the FCA, the Seventh Circuit, in *United States ex rel. Garst v. Lockheed-Martin Corp.*, 328 F.3d 374 (7th Cir.), *cert. denied*, 124 S. Ct. 450 (2003), affirmed the district court's dismissal of the relator's complaint on the grounds, among other things, that it did not satisfy the heightened pleading requirements of Rule 9(b), observing that "[t]o satisfy Rule 9(b), [relator] had to allege that Lockheed said something knowing at the time that the representation was false (or not intending to perform); failures to satisfy the customer *ex post* are not fraud." *Id.* at 378. In *United States ex rel. Costner v. URS Consultants, Inc.*, 317 F.3d 883 (8th Cir.), *cert. denied*, 124 S. Ct. 225 (2003), the Eighth Circuit expressly held that "[a] complaint alleging violations of the False Claims Act must be pled with particularity pursuant to Rule 9(b). This particularity requirement demands a higher degree of notice than that required for other claims. The claim must identify who, what, where, when, and how." *Id.* at 888 (citations omitted).

Am., Inc., 290 F.3d 1301, 1308-09 (11th Cir. 2002), *cert. denied*, 537 U.S. 1105 (2003); *United States ex rel. Totten v. Bombardier Corp.*, 286 F.3d 542, 551-52 (D.C. Cir. 2002); *Bly-Magee v. California*, 236 F.3d 1014, 1018 (9th Cir. 2001); *Harrison v. Westinghouse Savannah River Co.*, 176 F.3d 776, 783-84 (4th Cir. 1999); *United States ex rel. LaCorte v. SmithKline Beecham Clinical Labs., Inc.*, 149 F.3d 227, 234 (3d Cir. 1998); *United States ex rel. Thompson v. Columbia/HCA Healthcare Corp.*, 125 F.3d 899, 903 (5th Cir. 1997); *Gold v. Morrison-Knudsen Co.*, 68 F.3d 1475, 1476-77 (2d Cir. 1995)).[2]

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2. Since the First Circuit issued its decision in this matter on February 23, 2004, several other federal courts have applied Rule 9(b) to FCA claims. *See, e.g.*, *United States ex rel. Taylor v. Gabelli*, No. 03 Civ. 8762 (SAS), 2004 WL 1719357, at *7 (S.D.N.Y. July 29, 2004) (finding that FCA counts satisfied Rule 9(b)); *United States ex rel. Gear v. Emergency Med. Assocs. of Ill., Inc.*, No. 00 C 1046, 2004 WL 1433601, at *5-6 (N.D. Ill. June 25, 2004) (finding that FCA counts satisfied Rule 9(b)); *United States ex rel. Yannacopolous v. Gen. Dynamics*, 315 F. Supp.2d 939, 944-45 (N.D. Ill. 2004) (finding that FCA counts satisfied Rule 9(b)); *Allen v. Beta Constr.*, 309 F. Supp.2d 42, 45-46 (D.D.C. 2004) (finding that FCA counts satisfied Rule 9(b)); *United States ex rel. Bantsolas v. Superior Air & Ground Ambulance Transp., Inc.*, No. 01 C 6168, 2004 WL 609793, at *2-3 (N.D. Ill. Mar. 22, 2004) (dismissing FCA counts for failure to satisfy Rule 9(b) but granting leave to amend); *Hutchinson v. Andrulis Corp.*, No. 5:03CV1-MCR/WCS, 2004 WL 691790, at *3 (N.D. Fla. Mar. 19, 2004) (dismissing FCA counts for failure to satisfy Rule 9(b) but granting leave to amend); *United States ex rel. Williams v. Bell Helicopter Textron, Inc.*, No. 4:02-CV-996-A, 2004 WL 579505, at *3-4 (N.D. Tex. Mar. 18, 2004) (dismissing FCA counts for failure to satisfy Rule 9(b)); *United States v. Henderson*, No. Civ. 03-5060 (MJD/JDL), 2004 WL 540278, at * 2-3 (D. Minn. Mar. 16, 2004) (dismissing FCA counts for failure to satisfy Rule 9(b) but granting leave to amend).

Notwithstanding the uniformity and consistency among the decisions of various Courts of Appeals, Karvelas asks this Court to conclude that every single one of these courts, including the First Circuit, has incorrectly decided the issue of whether Rule 9(b) applies to FCA claims. Pet. at 10 ("For if in fact the circuit courts are applying that standard [Rule 9(b)] to False Claims cases, they are deviating from the course mandated by the Congress."). Karvelas, however, has failed to advance any compelling argument that legitimately calls into doubt the validity of the First Circuit's holding or that of any other Court of Appeals. The Courts of Appeals have provided sufficiently clear and consistent guidance on this issue to each other, district courts, potential and actual FCA plaintiffs, and FCA defendants. As a result, no need exists at this time for the Court to consider and resolve the question of whether Rule 9(b) applies to claims under the FCA.

II. THE LEGISLATIVE HISTORY OF THE 1986 AMENDMENTS TO THE FCA DEMONSTRATES THAT RULE 9(b) IS PROPERLY APPLICABLE TO FCA CLAIMS.

The legislative history upon which Karvelas relies for the proposition that Rule 9(b) should not apply to claims under the FCA underscores, as opposed to undermines, the correctness of the First Circuit's holding. Nothing in the 1986 amendments to the FCA changed the fundamental nature of the FCA: The FCA was, and remains, an anti-fraud statute. The express purpose of the FCA, as made clear by the Senate report explaining the 1986 amendments, S. Rep. No. 99-345 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266 ("Senate Report 345"), is to combat fraud upon the government. As Senate Report 345 observes in its opening sentence,

"[t]he purpose of S. 1562, the False Claims Reform Act, is to enhance the Government's ability to recover losses sustained *as a result of fraud* against the Government." S. Rep. No. 99-345, at 1, *reprinted in* 1986 U.S.C.C.A.N. 5266, 5266 (emphasis added). Throughout Senate Report 345, the purpose of the amendments to the FCA is identified as improving the efficacy of the FCA as "a tool against *fraud*." *Id.* (emphasis added). Indeed, the Report is replete with similar observations, including:

a. "The Committee's amendments contained in S. 1562 are aimed at correcting restrictive interpretations of the act's liability standard, burden of proof, qui tam jurisdiction and other provisions in order to make the False Claims Act a more effective *weapon against Government fraud*." S. Rep. No. 99-345, at 4, *reprinted in* 1986 U.S.C.C.A.N. 5266, 5269 (emphasis added).

b. "The False Claims Act is intended to reach all fraudulent attempts to cause the Government to pay our [sic] sums of money or deliver property or services." S. Rep. No. 99-345, at 9, *reprinted in* 1986 U.S.C.C.A.N. 5266, 5274.

c. "The Supreme Court's opinion in *United States v. Neifert-White Co.*, 390 U.S. 228 (1968), indicated that the False Claims Act 'was intended to reach all types of fraud, without qualification, that might result in financial loss to the Government.' The Committee strongly endorses this

> interpretation of the act and, to remove any ambiguity, has included this amendment to resolve the current split in the caselaw [sic] relating to such material misrepresentations." S. Rep. No. 99-345, at 19, *reprinted in* 1986 U.S.C.C.A.N. 5266, 5284.

Given Congress' express acknowledgment of the purpose of the FCA as a remedy to redress *fraud* against the government, there is no merit to Karvelas' efforts to leverage the 1986 amendments clarifying the FCA's constructive knowledge standard as support for the proposition that the heightened pleading requirements of Rule 9(b) do not apply to FCA claims.[3] By expressly articulating the standard for constructive knowledge under the FCA, Congress in no way intended to convert the FCA into something other than an anti-fraud statute. As demonstrated above, such an interpretation of the 1986 amendments would be flatly inconsistent with their purpose. Rather, Congress' intent was much more limited, namely, it sought to ensure that the FCA's constructive knowledge standard would reach the "the 'ostrich' type situation where an individual has 'buried his head in the sand' and failed to make simple inquiries which would alert him that false claims are being submitted." S. Rep. No. 99-345, at 21, *reprinted in* 1986 U.S.C.C.A.N.

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3. Karvelas overstates the effect of the 1986 amendments on the FCA. The amendments clarified, in an effort to "avoid varying interpretations" thereof, the act's constructive knowledge standard. S. Rep. No. 99-345, at 20, *reprinted in* 1986 U.S.C.C.A.N. 5266, 5285. The 1986 amendments did not, however, make a wholesale change to the "mental element" of the FCA as Karvelas suggests. *See, e.g.*, Pet. at 12-15. Both before and after the 1986 amendments, the FCA imposed a "knowing" standard.

5266, 5286; *see also id.* at 20, *reprinted in* 1986 U.S.C.C.A.N. 5266, 5285 (holding liable "those who have 'actual knowledge that the claim is false, fictitious, or fraudulent, or acts in gross negligence of the duty to make such inquiry as would be reasonable and prudent to conduct under the circumstances to ascertain the true and accurate basis of the claim").

Notwithstanding any clarifications of the FCA's knowledge standard, the FCA, after the 1986 amendments, just as it always had, requires proof of knowledge *and* the submission of a false or fraudulent claim. Indeed, as federal courts, including the First Circuit, have recognized, the *sine qua non* of an FCA violation is the submission of a *claim*, *see* Pet. App. at 5a, 18a; *United States ex rel. Clausen v. Lab. Corp. of Am., Inc.*, 290 F.3d 1301, 1311 (11th Cir. 2002), *cert. denied*, 537 U.S. 1105 (2003), and not the state of mind of the party that submitted the allegedly false claim. Moreover, for the claim to give rise to liability under the FCA, it must be a *false* or *fraudulent* claim. That Karvelas would like to write these elements – submission of a claim and the claim's falsity – out of the FCA does not mean, however, that Congress intended to do so in the 1986 amendments. Because the falsity of the claim submitted to the government lies at the core of an FCA violation, applying the heightened pleading requirements of Rule 9(b) to claims under the FCA is entirely consistent with the purpose of the act and the 1986 amendments thereto. *Cf. Hayduk v. Lanna*, 775 F.2d 441, 443 (1st Cir. 1985) ("[I]n cases in which fraud lies at the core of the action, [Rule 9(b)] does not permit a complainant to file suit first, and subsequently to search for a cause of action.") (citation omitted).

III. NO CONFLICT EXISTS BETWEEN THE FIRST CIRCUIT'S HOLDING AND THE COURT'S PRECEDENTS WHICH LEAVE NO DOUBT THAT THE FCA IS AN ANTI-FRAUD STATUTE AND THAT RULE 9(b) APPLIES TO ALL AVERMENTS OF FRAUD.

Similarly, the First Circuit's holding that the heightened pleading requirements of Rule 9(b) apply to claims under the FCA is entirely consistent with prior decisions of the Court. To begin, the Court has on several occasions recognized and described the FCA as an anti-fraud statute. *See, e.g., Vermont Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765, 781 & n.10 (2000); *United States v. Neifert-White Co.*, 390 U.S. 228, 231, 233 (1968). Accordingly, the First Circuit simply followed the Court's pre-existing, clear guidance that claims under the FCA should be treated as fraud claims.

Moreover, no conflict exists between the First Circuit's application of Rule 9(b) to Karvelas' FCA claims and the Court's decision in *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506 (2002). In *Swierkiewicz*, the Court held that a heightened pleading requirement should not be applied to employment discrimination claims. *Id.* at 508. As a threshold matter, *Swierkiewicz* is inapposite because the pleading standard applicable in an employment case in no way dictates the applicable pleading standard in the FCA context. In any event, the Court's more general observations in *Swierkiewicz* underscore the propriety of the First Circuit's holding. In *Swierkiewicz*, the Court observed that "Rule 8(a)'s simplified pleading standard applies to all civil actions, with limited exceptions," which exceptions include "all averments of fraud or mistake." *Id.* at 513. Because the FCA is an anti-

fraud statute, Karvelas' claims thereunder fall squarely into the exception to Rule 8(a) notice pleading that the Court expressly recognized in *Swierkiewicz*. As a result, the First Circuit's scrutiny of Karvelas' complaint under Rule 9(b) was in complete concert with the teachings of *Swierkiewicz*.

IV. THE FIRST CIRCUIT'S HOLDING WAS CORRECT ON THE MERITS.

Moreover, the First Circuit properly applied Rule 9(b) to Karvelas' complaint. As Karvelas correctly notes, Rule 9(b) has two parts. Pet. at 21-22. The first part of Rule 9(b) requires that "[i]n all averments of fraud or mistake, the *circumstances constituting fraud* or mistake shall be stated with *particularity*." Fed. R. Civ. P. 9(b) (emphasis added). Accordingly, the First Circuit applied Rule 9(b)'s heightened pleading requirements to "the circumstances constituting [the] fraud" which, in the FCA context, are the details of the allegedly false claim for payment that was submitted to the government. "As applied to the FCA, Rule 9(b)'s requirement that averments of fraud be stated with particularity – specifying the 'time, place, and content' of the alleged false or fraudulent representations, means that a relator must provide details that identify particular false claims for payment that were submitted to the government." Pet. App. 18a-19a (footnote omitted); *see also United States ex rel. Doe v. Dow Chem. Co.*, 343 F.3d 325, 329 (5th Cir. 2003) ("The 'time, place and contents of the false representations, as well as the identify of the person making the misrepresentation and what [that person] obtained thereby' must be stated in a complaint alleging violation of the FCA in order to satisfy Rule 9(b).") (citation omitted) (alternation in original); *United States ex rel. Totten v. Bombardier Corp.*, 286 F.3d 542, 552 (D.C. Cir. 2002)

("[T]he 'circumstances' that must be pleaded with specificity are matters such as the 'time, place, and contents of the *false* representations,' such representations being the *element* of fraud about which [Rule 9(b)] is chiefly concerned.") (citation omitted) (emphasis in original); *United States ex rel. Russell v. Epic Healthcare Mgmt. Group*, 193 F.3d 304, 308 (5th Cir. 1999) (noting that under the FCA, liability "consists in part of false statements or claims for payment presented to the government. Because such statements or claims are among the circumstances constituting fraud in a False Claims Act suit, these must be pled with particularity under Rule 9(b)") (internal citation omitted).

Rule 9(b) further provides that "[m]alice, intent, *knowledge*, and other condition of mind of a person may be averred *generally*." Fed. R. Civ. P. 9(b) (emphasis added). The First Circuit appreciated and expressly acknowledged this distinction built into Rule 9(b):

> That Rule 9(b) allows "malice, intent, knowledge, and other condition of mind of a person [to be] averred generally" does not mean that particularity requirements do not apply to FCA claims. Rather, it simply means that a qui tam relator need not plead with particularity allegations concerning defendants' knowledge, reckless disregard, or deliberate ignorance of the submission of false claims. . . . On the other hand, the details of the actual presentation of false or fraudulent claims to the government can and must be plead with particularity in order to meet the requirements of Rule 9(b).

Pet. App. at 10a-11a (alteration in original). Although the First Circuit did acknowledge that certain elements of an FCA

claim would be subject to Rule 9(b)'s less exacting pleading standards, the First Circuit could not and did not accept the proposition that because the FCA imposes a "knowing" standard, as opposed to an intent to deceive standard, a claim under the FCA *in its entirety* is not subject to Rule 9(b)'s heightened pleading requirements. Nor should it have. Taken to its logical extreme, this proposition would mean that no fraud claim ever would be subject to Rule 9(b)'s heightened pleading requirements. That is, under Karvelas' theory, the "circumstances constituting [the] fraud" would never have to be pled with particularity, even where the fraud claim required proof of an intent to deceive, because under the second part of Rule 9(b), intent, like knowledge, only need be pled generally. Any rule that would yield such an absurd result should not be countenanced.

CONCLUSION

For the foregoing reasons, Respondents Melrose-Wakefield Hospital, Melrose-Wakefield Healthcare Corporation, and Hallmark Health System, Inc. respectfully request that the Court deny the Petition for a Writ of Certiorari.

Respectfully submitted,

MICHAEL K. FEE
Counsel of Record
EMILY C. SHANAHAN
ROPES & GRAY LLP
One International Place
Boston, MA 02110
(617) 951-7000

Counsel for Respondents